PRACTICE ADVISORY ON PRETERMISSIONS[1]
January 23, 2026

GENERAL OVERVIEW OF PRETERMISSION

Pretermission allows immigration judges to deny applications without first having a hearing regarding respondents' asylum claims. Immigration judges may pretermit a case at any stage in proceedings. Recently, it has commonly occurred at master calendar hearings or at the start of individual hearings. In some cases, immigration judges have issued "scheduling orders," giving respondents a deadline by which to file certain documents. Where respondents have failed to do so, some immigration judges have pretermitted such cases.

BASES FOR PRETERMISSIONS

Pretermissions Based on Incomplete Forms I-589 (*Matter of C-A-R-R-*)

The most common basis on which asylum applications are currently pretermitted is an asserted "incompleteness" of Form I-589, typically where the Immigration Judge or the Department of Homeland Security (DHS) claims that certain questions on the form were left blank or insufficiently answered. In support of pretermission, the Board of Immigration Appeals' ("BIA" or "Board") decision, *Matter of C-A-R-R-*, 29 I&N Dec. 13 (BIA 2025), is often cited. However, as explained in the National Immigration Project (NIPNLG) and Center for Gender and Refugee Studies (CGRS) practice advisory, *Fighting for a Day in Court: Understanding and Responding to Pretermission of Asylum Applications*, *Matter of C-A-R-R-* does not provide a valid legal basis for pretermitting cases on this ground.

Immigration judges have been explicitly encouraged to pretermit asylum applications since April 2025, when the Executive Office for Immigration Review (EOIR) issued Policy Memorandum 25-28, *Pretermission of Legally Insufficient Applications for Asylum*. However, this policy conflicts with the requirements of 8 C.F.R. § 1208.3(c)(3), which mandate that allegedly incomplete applications

[1] Please be advised that immigration law changes frequently. This practice advisory is provided as general guidance only and is intended for authorized legal counsel; it does not constitute legal advice and is not a substitute for independent research into the current law and practices applicable in a specific jurisdiction. Please consult with your Human Rights First mentoring attorney for case-specific advice.

must be returned to the applicant to allow an opportunity to correct and resubmit the application. If EOIR does not return the application within 30 days, the application is deemed complete. This correct process was previously outlined in EOIR Policy Memorandum 21-06, which has since been reinstated. However, some immigration judges are not providing an opportunity to cure an incomplete Form I-589, and may not provide any kind of advance warning to respondents before pretermitting a case, despite the requirements of 8 CFR 1208.3(c)(3). Given the tension between current policy and established regulatory procedure—as well as the widespread misapplication of *Matter of C-A-R-R-*—attorneys should be prepared to identify and challenge attempts to pretermit asylum applications based on alleged incompleteness. For practical guidance, including common pretermission rationales and strategies to avoid them, consult resources compiled by immigration advocate Taylor Levy,[2] along with the NIPNLG/CGRS advisory referenced above.

In practice, counsel should ensure that every question and sub-question on Form I-589 is fully and explicitly answered on the form itself, rather than relying solely on an attached or forthcoming declaration. Additionally, attorneys should thoroughly review any previously filed versions of Form I-589 and make necessary amendments well in advance of upcoming hearings.

Pretermissions Based on Failure to State a Claim (*Matter of H-A-A-V-*)

In September 2025, the Board issued its decision in *Matter of H-A-A-V-*, 29 I&N Dec. 233 (BIA 2025). The Board held that Immigration Judges may pretermit applications where the respondent has not established prima facie eligibility for asylum, withholding of removal, or protection under the Convention Against Torture—even when viewing the application in the light most favorable to the respondent. The decision rests on the premise that a hearing is required only when there is a factual dispute that must be resolved.

In practice, this ruling risks preventing respondents from presenting testimony and supporting evidence that would supply critical context needed to fully develop the claim. Accordingly, practitioners should ensure that the Form I-589 itself contains sufficient factual detail to demonstrate prima facie eligibility for relief. This includes providing sufficient facts and articulating a clear nexus to a legally cognizable protected ground and, where the persecutor is a non-state actor, establishing that the government is unable or unwilling to provide protection.

Counsel should also be prepared at all upcoming hearings to explain why the facts asserted in the application, if accepted as true, establish eligibility for asylum or related relief. Further, if Form I-589 indicates the potential applicability of an asylum bar—such as the one-year filing deadline or the Circumvention of Lawful Pathways rule—an explanation of any applicable exceptions should be provided directly in response to relevant question on the form.

[2] *See* https://tinyurl.com/zealous2025.

Pretermissions Based on Failure to Pay the Annual Asylum Fee (H.R. 1 / EOIR PM 25-36)

On July 4, 2025, Congress enacted H.R. 1 ("One Big, Beautiful Bill Act"), which created a new $100 annual asylum fee for all pending Form I-589 applications. EOIR implemented the fee through Policy Memorandum 25-36 and, on September 23, 2025, added a new payment option—"Annual Asylum Fee (AAF) – Pending Application for Asylum"—to the EOIR Payment Portal. The fee applies per asylum application, no fee waiver exists, and EOIR has stated that applicants will have thirty days from the date of a billing notice to make payment, after which the application "may be deemed abandoned."

On October 30, 2025, the U.S. District Court for the District of Maryland granted a preliminary injunction in *ASAP v. USCIS*, temporarily prohibiting EOIR and USCIS from dismissing or pretermitting asylum applications based on non-payment. The injunction does not invalidate the fee itself and may be lifted or modified at any time. Because EOIR has indicated that non-payment after the 30-day deadline may result in a finding of abandonment once enforcement resumes, counsel should treat the injunction as temporary, closely track developments in *ASAP v. USCIS*, and monitor both physical and electronic delivery of AAF notices. Attorneys may also consider voluntary pre-payment, as EOIR has confirmed that anticipatory payments will be credited when billing resumes.

Pretermissions Based on Asylum Cooperative Agreements ("ACAs") in Light of *Matter of C-I-G-M- & L-V-S-G-* (BIA 2025)

At the end of 2019, the first Trump administration entered into "asylum cooperative agreements" ("ACAs") with El Salvador, Guatemala, and Honduras. For several months from 2019 to 2020, approximately 1,000 non-Guatemalan individuals who entered the United States seeking asylum were not permitted to seek protection in the United States and were screened for a fear of deportation to Guatemala.[3] At that time, screenings were performed while individuals were in the custody of Customs and Border Protection (CBP), making attorney access extremely limited. *See*, e.g., complaint and case history in *U.T. v. Barr*, No. 1:20-cv-00116 (D.D.C.), which challenges the ACA program's legality and procedure. After the COVID-19 pandemic reached the United States, third-country removals to Guatemala ground to a halt and the subsequent Biden administration rescinded those ACAs but did not rescind the underlying rule permitting such agreements in the future. Recently, the administration has pursued ACAs with Belize, Ecuador, Guatemala, Honduras, Paraguay and Uganda while future ACAs with additional countries are anticipated.

Human Rights First and Refugees International has launched *Banished by Bargain: Third Country Deportation Watch*, a new website that provides a

[3] Adolfo Flores, *Border Patrol is Detaining Asylum-Seeking Families at a Texas Facility for Longer than the Law Allows*, BUZZFEED NEWS, Jan. 11, 2020, available at https://www.buzzfeednews.com/article/adolfoflores/border-patrol-asylum-seeking-families-guatemala-donna.

comprehensive picture of the diplomatic deals behind the agreements and their various forms, detailing where people are being sent, and providing resources for journalists, policymakers, advocates, and attorneys working to understand and challenge the forcible transfer of asylum seekers to third countries.

While under the first Trump administration, ACAs were applied only to people arriving at the U.S.-Mexico border, the current administration has begun to apply ACAs to people in the interior, including people who would not be considered recent arrivals. The administration is claiming the authority to do this because the rule that they are relying on went into force on November 19, 2019 (8 CFR 1240.11(h)).[4] This means that the administration may attempt to remove individuals to any country with an executed ACA if they entered the United States at a port of entry without a visa, or if they entered without inspection between ports of entry, on or after November 19, 2019.

On October 31, 2025, in *Matter of C-I-G-M- & L-V-S-G-*, 29 I&N Dec. 291 (BIA 2025), the BIA issued a precedential decision establishing the procedural and evidentiary framework for pretermission of asylum applications under ACAs. The BIA held that when DHS asserts that an ACA applies, the immigration judge must first determine whether the safe-third-country bar applies before—and separate from—any adjudication on the merits of asylum eligibility. The decision further clarified that the burden of proof rests entirely on the respondent, who must affirmatively establish that an exception to the ACA applies—such as by demonstrating, by a preponderance of the evidence, that they are more likely than not to face persecution on a protected ground or to be subjected to torture in the designated third country—in order to avoid pretermission. Generalized country conditions or attorney arguments are not sufficient; individualized evidence is required.

The BIA also emphasized that immigration judges lack authority to decide whether the third country offers a "full and fair" asylum process or whether it is in the "public interest" to allow the respondent to apply for asylum in the United States. Those determinations are reserved to DHS and the Attorney General under 8 C.F.R. § 1240.11(h). *Matter of C-I-G-M- & L-V-S-G-* reframes ACA pretermission as a mandatory threshold screening inquiry: where a respondent cannot establish that an ACA exception applies—such as by demonstrating, under the "more-likely-than-not" standard, a risk of persecution or torture in the designated third country—the immigration judge must pretermit the asylum application without reaching the merits and enter an order of removal to that third country.

DHS has filed motions to pretermit cases for many individuals in removal proceedings from Latin American and African countries on the basis that they will be able to send them to countries with ACA agreements.

[4] For a copy of the interim final rule, see https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and.

Certain individuals are excepted from the ACAs if:

- The immigration judge determines that the relevant agreement does not apply to the noncitizen or does not preclude the noncitizen from applying for asylum in the United States;
- The immigration judge determines that the noncitizen has demonstrated that it is more likely than not that they would be persecuted on account of a protected ground or tortured in the third country;
- The individual obtains a public interest exception from DHS under the rule; or
- An exception exists within the language of a particular country's ACA (e.g., some ACAs allow for an exception for individuals admitted to the United States).

In November 2025, CGRS released a practice advisory on responding to asylum cooperative agreement-based pretermission. To access this practice advisory, you must first have a CGRS account. This new CGRS resource is available through **CGRS's TA Library**, which can be accessed by clicking the "View TA Library for This Case" link next to the case on your **My Account page**. In addition to the practice advisory, CGRS provides template oppositions to DHS motions to pretermit based on the ACAs with several countries, which you can adapt for your client's case.

PREPARING AGAINST PRETERMISSION

Fully answer all questions on the asylum application form: Review each question on Form I-589 carefully with your client and be sure that you answer each part thoroughly in the response. Do not assume that you will be able to supplement these answers in the client's declaration, supporting evidence, or testimony.

Be sure that your client's application satisfies all prima facie elements for relief: Ensure that you have provided enough detail about your client's claim within the Form I-589 to support all of the necessary prima facie elements for relief. Do not assume that you will be able to rely on your client's declaration, other evidence, or testimony to avoid pretermission.

Do not rely on submitting a declaration to avoid pretermission: Remember that a declaration is not technically part of Form I-589. Ensure that you have thoroughly answered all questions and put forth enough information to address all prima facie elements within Form I-589. If more space is needed, counsel can add additional information using the Form I-589 Supplement B page and attach it to the application.

Review submitted asylum applications for potential deficiencies: If you have any clients with pending asylum applications, review them to ensure that each application properly

addresses each question within Form I-589 and raises all necessary prima facie elements for relief. If you need to revise and/or supplement a pending I-589 to satisfy these requirements, it is advisable to file amendments rather than a whole new Form I-589 to avoid issues with the one-year filing deadline and the asylum clock under *Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015).

Address fear of removal to ACA countries: In light of *Matter of C-I-G-M- & L-V-S-G-,* the respondent bears the burden to demonstrate by a preponderance of the evidence that it is more likely than not they would be persecuted on account of a protected ground or tortured in the proposed third country. Accordingly, should DHS argue the client could be removed to any ACA country, state on the record, if applicable, that the client fears removal to each such country, and request a continuance to submit evidence as the client requests an evidentiary opportunity before any designation is effectuated, and that notice and an opportunity to respond are required if DHS designates an additional ACA country in the case.

Against this backdrop, attorneys must treat the ACA threshold like a withholding/CAT case focused on the third country. In addition to contesting removability and preserving objections to truncated procedures, counsel should affirmatively brief both the withholding of removal and CAT claims, explicitly addressing every statutory and regulatory requirement, including nexus, protected ground (for withholding), government acquiescence (for CAT), and the "more likely than not" standard. Framing the issue this way forces the immigration judge to analyze the claim under the correct burden and evidentiary framework rather than treating the ACA bar as a purely procedural shortcut.

Attorneys should submit individualized proof of persecution or torture risk in the third country, which can include but is not limited to: expert declarations addressing the respondent's particular vulnerabilities (e.g., sexual orientation, gender-based risk, disability, political profile); documentation of targeting or patterns of harm to similarly situated non-nationals; and analyses of chain-refoulement risk. Where appropriate, argue that the third country is not a "safe" country for purposes of withholding/CAT because its legal system, policing structure, or de facto practices leave the respondent without meaningful protection and expose them to return to their country of feared persecution.

While the immigration judges lack jurisdiction to determine if the third country lacks full and fair procedures for applying for asylum, counsel should consider raising this issue to preserve error in the event of a petition for review to the circuit court. Counsel should also raise the argument that pursuant to INA § 241(b)(2)(E)(vii) the client may not be ordered removed to a third country without evidence that the third country will actually accept the client. *See Himri v. Ashcroft*, 378 F.3d (9th Cir. 2004). While this argument was rejected in dicta by the Board in *Matter of C-I-G-M- & L-V-S-G-,* counsel should preserve the issue for circuit court review, particularly in the Ninth Circuit based on the court's decision in *Himri*. Further, if applicable, identify and brief any issues regarding the ACA's applicability to the respondent, including whether an additional exception applies under 8 C.F.R. § 1240.11(h)(3) or the relevant Federal Register notice applies.

Finally, DHS is often filing its motions to pretermit immediately before an individual hearing and outside of the required deadline for filing such motions; in such cases, counsel should argue that the motion should be denied as untimely.

Given the BIA has underscored that argument is not evidence and that vague or generalized references to risk will not meet the "more likely than not" burden for the third country, counsel should request an evidentiary hearing to resolve disputed facts, including the opportunity to present expert testimony and preserve objections to any paper-only adjudication.[5]

Know the law on pretermissions at each hearing: Be prepared with knowledge of the law on pretermissions when you attend each master calendar and individual hearing. Because the EOIR policy memos and BIA cases contradict the regulations, arm yourself with the law to make your record in case necessary.

WHAT TO DO IN CASE OF PRETERMISSION

If your case has been pretermitted, you should reserve appeal. You should timely file a Notice of Appeal with the BIA. If the BIA affirms the pretermission and dismissal, the subsequent step would be to file a Petition for Review with the appropriate federal circuit court.

Notify your Human Rights First mentoring attorney immediately if the case has been pretermitted so we can strategize additional options.

For cases pretermitted based on ACAs, in addition to appealing the immigration case, consider parallel or subsequent federal litigation for structural challenges (APA, Suspension Clause, non-refoulement procedures) drawing on ACA litigation such as *U.T. v. Barr*.

For cases pretermitted based on incomplete I-589s or failure to state a claim, in limited, case-specific circumstances, there may be a basis for a Motion to Reopen premised on ineffective assistance of prior counsel pursuant to *Matter of Lozada*.[6]

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[5] *See generally* National Immigration Litigation Alliance, Northwest Immigrant Rights Project, and Florence Immigrant & Refugee Rights Project Practice Advisory, *Protecting Noncitizens Granted Withholding of Removal or CAT Protection Against Deportation to Third Countries Where They Fear Persecution/Torture* (Jan 29, 2025).

[6] *See* Immigrant Legal Resource Center Practice Advisory, *Reopening Removal Proceedings Based on the Ineffective Assistance of Prior Counsel* (June 2025).